No. 81-96

Office - Supreme Court, U.S.
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SEP 16 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

AMERADA HESS CORPORATION,

Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

(Attorneys' names appear on inside cover)

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224
(518) 474-8101

SHIRLEY ADELSON SIEGEL
Solicitor General

Counsel of Record

PAUL, WEISS, RIFKIND, WHARTON,
& GARRISON
345 Park Avenue
New York, N.Y. 10154
(212) 644-8000
Co-Counsel for Appellants
Tully, Lynch and Koenig

SIMON H. RIFKIND
EDWARD N. COSTIKYAN
RICHARD D. FRIEDMAN
MICHAEL C. LASKY

Of Counsel

SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

Defendants-appellants ("the State") submit this supplemental brief, pursuant to Rule 16.6 of the Rules of this Court, to call attention to intervening matter not available at the time of our last filing. On August 28, 1981, plaintiff-appellee New England Petroleum Corp. ("Nepco") filed a Memorandum of Law in support of a motion for summary judgment on three causes of action in its state court action. *New England Petroleum Corp.* v. *State of New York*, Index No. 2913-91 (Sup. Ct. Albany Co.).* That Memorandum directly supports, and is in fact explicitly based on, arguments that the State has made throughout the actions at bar, that were rejected by the lower courts, and that the State believes should be given plenary review by this Court.

Thus, the Nepco Memorandum, p. 32, declares: "Obviously, the [New York] tax . . . is 'in the nature of an income tax' " (quoting with approval a brief filed in this action for two of the defendants; footnote omitted). The basis of this statement is that the statute bars the company from treating the tax "as a cost of sales which the taxpayer was entitled to recover in the sales price," *id.* at 30:

> "The tax imposed by the New Tax Act [1980 N.Y. Laws, chs. 271, 272] is, and was intended to be a tax on perceived wealth, profits or income, not a tax on gross receipts. The anti-pass through feature produces—and was intended to produce—that operation and effect."

Id. at 36; *accord*, *id.* at 33-34.

Nepco argues that the New York tax, being in the nature of an income tax, is arbitrary and capricious because it presumes

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* The state court denied a previous motion by Nepco for summary judgment, on its other causes of action, on July 15, 1981.

irrebuttably that the oil companies have made profits bearing some correlation to their gross receipts. That argument is not at issue here; the State will demonstrate in the state court action that the New York law fits well within its broad powers of taxation.

What is significant for present purposes is that in a related litigation Nepco, one of the appellees here, has adopted arguments that we have made throughout this litigation and that justify plenary review of the TECA judgment. First, as we have pointed out, Jurisdictional Statement at 26, the now-revoked federal regulations, 10 C.F.R. § 217.83(c)(2)(iii)(E)(7), Apdx. 80a, "specifically barred passthrough of income taxes, which states intend to be absorbed by the taxpayer." Nepco itself has now stated that New York's tax "is in the nature of an income tax" because New York intended the tax, like an income tax, to be absorbed by the taxpaying oil companies. The federal regulations themselves, therefore, arguably prohibited passthrough of New York's tax. And even if the regulations did not affirmatively prohibit the passthrough, they certainly did not authorize oil companies, in derogation of state law, to pass through a tax that shares a primary characteristic of an income tax.

Second, Nepco has in effect conceded that the passthrough prohibition of New York's tax statute should not be viewed as a price regulation but as a rule of tax incidence. Nepco recognizes that the passthrough prohibition makes New York's tax comparable to an income tax, and that the prohibition "produces—and was intended to produce—[the] operation and effect" of causing the oil companies themselves to absorb the tax. *Id.* at 36. This is simply another way of stating our point: the prohibition is a rule of tax incidence, not a price regulation. Indeed, in support of its argument that the New York tax is "in the nature of an income tax," Nepco's Memorandum, p. 31, cites our contention in the instant action "that the anti-passthrough provision is merely a rule of 'tax incidence' to require that oil companies bear the tax."

As we have pointed out in our Jurisdictional Statement at 13-15, this point has broad significance for the preemption issue as it relates to both regulated and nonregulated products* and also for the issue of federal jurisdiction.

In short, Nepco's position in the related state court litigation highlights important errors made by TECA. It is difficult to see how, in light of that position, it can seriously be denied that this case, which is of such great public importance, presents substantial questions calling for plenary review by this Court.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
State Capitol
Albany, New York 12224
Attorney for Appellants

Shirley Adelson Siegel
Solicitor General
Counsel of Record

and

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
Co-Counsel for Appellants
Tully, Lynch and Koenig

Simon H. Rifkind
Edward N. Costikyan
Richard D. Friedman
Michael C. Lasky

Of Counsel

September 15, 1981

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* Even if the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 *et seq.* preempted state power to regulate petroleum prices, that preemption could not extend to a law that might affect prices indirectly only by imposing a rule of tax incidence, *see* Jurisdictional Statement at 24, 26.